

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	File Number EB-06-KC-067
	)	
Jason L. Duncan	)	NAL/Acct. No. 200632560004
	)	
Bettendorf, Iowa	)	FRN 0015021819

**FORFEITURE ORDER**

**Adopted:** August 8, 2006

**Released:** August 10, 2006

By the Regional Director, South Central Region, Enforcement Bureau:

**I. INTRODUCTION**

1. In this *Forfeiture Order* (“*Order*”), we issue a monetary forfeiture in the amount of ten thousand dollars (\$10,000) to Jason L. Duncan (“Mr. Duncan”), for willful and repeated violation of Section 301 of the Communications Act of 1934, as amended (“Act”).<sup>1</sup> The noted violation involves operating an unlicensed radio transmitter.

**II. BACKGROUND**

2. On April 18, 2006, in response to information regarding an unlicensed radio station in Bettendorf, Iowa, an agent from the Enforcement Bureau’s Kansas City Office (“Kansas City Office”) monitored broadcast transmissions on 103.3 MHz in Bettendorf, Iowa. A voice on the broadcast identified the station as “power one-oh-three.” The agent, using direction finding techniques, located the transmissions on 103.3 MHz to the Northwest Bank building located at 2550 Middle Road, Bettendorf, Iowa. The agent took field strength measurements and determined that the signals being broadcast exceeded the limits for operation under Part 15 of the Commission’s Rules (“Rules”)<sup>2</sup> and therefore required a license. The agent observed a building directory identifying “Class Act” and “www.pmor.com” as occupants of Suite 300. The building manager told the agent that the only radio station he knew of in the building was “PMOR/Class Act Entertainment” which the manager said broadcast over the internet. The agent went to the roof of the building and confirmed that radio transmissions emanated from an antenna mounted on the roof. At the agent’s request, the building manager telephoned the contact for “PMOR/Class Act Entertainment” and Matthew Britcher (“Mr. Britcher”) arrived a short time later. Mr. Britcher identified himself as the “promotions director” of “103-point-3.” Mr. Britcher stated that the radio station did not need a license because the station operated pursuant to “the War Powers Act.” The agent served a Notice of Unlicensed Radio Operation (“Notice”) on Mr. Britcher with an attached copy of Sections 301 and 303(n) of the Act. The Notice stated that the unlicensed operation of the radio station must be discontinued immediately, that operation of radio transmitting equipment without a valid radio station authorization

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<sup>1</sup> 47 U.S.C. § 301.

<sup>2</sup> Section 15.239 of the Rules provides that non-licensed broadcasting in the 88-108 MHz band is permitted only if the field strength of the transmission does not exceed 250  $\mu$ V/m at three meters. 47 C.F.R. § 15.239. On April 18, 2006, the measurements indicated that the signal was 28642 times greater than the maximum permissible level for a non-licensed Part 15 transmitter.

constituted a violation of Section 301 of the Act, and that failure to stop the operation could result in various penalties, including substantial monetary fines, forfeiture of the equipment, and criminal sanctions. The agent requested to inspect the radio station inside the office space leased by Mr. Britcher, but Mr. Britcher refused stating “there was no warrant.” The agent told Mr. Britcher of his obligation to allow an inspection of the station pursuant to Section 303(n) of the Act, and Mr. Britcher again refused. During this interview, Mr. Britcher was accompanied by an unidentified man who videotaped the interview.

3. On April 19, 2006, the Kansas City Office agent again monitored broadcast transmissions on 103.3 MHz in Bettendorf, Iowa, and, using direction finding techniques, located broadcast transmissions on 103.3 MHz to 2550 Middle Road in Bettendorf, Iowa. This was the same location as that determined to be the source of the unlicensed transmissions operating on 103.3 MHz on April 18, 2006. The agent made field strength measurements and determined that the station still exceeded the limits for operation under Part 15 of the Rules and, therefore, still required a license.<sup>3</sup>

4. On April 25, 2006, the Kansas City Office agent received a telephone call from a person identifying himself as Jason Duncan. Mr. Duncan stated that he was the person videotaping the interview of Mr. Britcher on April 18, 2006. The agent explained to Mr. Duncan the Notice that was issued to Mr. Britcher. Mr. Duncan stated that he had seen the Notice and read it.

5. On May 2, 2006, a Notice of Unlicensed Operation was issued to Jason Duncan (“Duncan Notice”). This notice warned Mr. Duncan that operation of the unlicensed radio station on 103.3 MHz violated 47 U.S.C. § 301; outlined the potential penalties for operating an unlicensed station in violation of 47 U.S.C. § 301, including seizure of the equipment, fines and imprisonment; and directed the operators of the station to terminate operation of the unlicensed station immediately.

6. The Kansas City Office received a response dated May 10, 2006, to the Duncan Notice.<sup>4</sup> The response stated that the station “Power Hits 103.3” has authority to operate pursuant to 47 C.F.R. § 73.3542, and that the station has applied for authority according to that section. The response included an “application” for authority to operate under that section.

7. On June 9, 2006, the Kansas City Office issued to Mr. Duncan a *Notice of Apparent Liability for Forfeiture* (“NAL”) in the amount of \$10,000 that found Mr. Duncan had willfully and repeatedly violated Section 301 of the Act by operating an unlicensed radio transmitter.<sup>5</sup>

8. On June 19, 2006, the Commission’s mailroom in Washington, D.C. received a letter dated June 13, 2006, from Mr. Duncan’s counsel of record to the Secretary of the Commission. The letter purported to be an “Informal application for broadcast operation” under Section 73.3542 of the Rules to operate an FM station on 103.3 MHz by Class Act Entertainment, Jason Duncan, Matthew Britcher, and Power Hits 103.3. Attached to the letter was a document titled “Informal Application for Emergency Authorization to Operate a Radio Station Under 47 CFR 73.3542.” The contents of this document appear identical to the “application” submitted by Mr. Duncan’s counsel of record to the Kansas City Office on May 11 and May 15, 2006. As of the release date of this *Order*, no action has been taken by the Commission regarding this “application.”

<sup>3</sup> The measurements made on April 19, 2006, indicated that the signal was 33,520 times greater than the maximum permissible level for a non-licensed Part 15 transmitter.

<sup>4</sup> The Kansas City Office received the response via email on May 11, 2006, and received a hard copy via regular mail on May 15, 2006. This response was by legal counsel stating he represented both Mr. Britcher and Mr. Duncan. The response stated it served as a formal response to both the Notice issued to Mr. Britcher and the Notice of Unlicensed Operation mailed to Mr. Duncan.

<sup>5</sup> *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200632560004 (Enf. Bur., South Central Region, Kansas City Office, released June 9, 2006).

9. On July 10, 2006, the Kansas City Office received via electronic mail a response to the NAL from Mr. Duncan's legal counsel ("Response").<sup>6</sup> In his Response, Mr. Duncan requests cancellation or reduction of the proposed forfeiture, arguing: that he has authority to operate since he has applied for emergency authority under Section 73.3542 of the Commission's Rules; that any Commission enforcement action against him is preemptive, unauthorized and unconstitutional since the Commission has not responded to his request for emergency authority; that his Constitutional rights are being infringed; and that no court has ruled on the constitutionality of the Commission's forfeiture procedures.

### III. DISCUSSION

10. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Act,<sup>7</sup> Section 1.80 of the Rules,<sup>8</sup> and *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*.<sup>9</sup> In examining Mr. Duncan's response, Section 503(b) of the Act requires that the Commission take into account the nature, circumstances, extent and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.<sup>10</sup>

11. Section 301 of the Act requires that no person shall use or operate any apparatus for the transmission of energy or communications or signals by radio within the United States except under and in accordance with the Act and with a license.<sup>11</sup> Mr. Duncan does not deny operating radio transmitting equipment but makes several arguments that he has authority to operate and that Commission enforcement action against him is improper.

12. Mr. Duncan first argues that he applied for "emergency right to broadcast under 47 CFR 73.3542" and that, since the Commission has not responded to that request, the Commission is barred from any forfeiture action, thus making Commission enforcement action "preemptive," "unauthorized," and "unconstitutional." Section 73.3542 of the Rules states in pertinent part:

(a) Authority may be granted, on a temporary basis, in extraordinary circumstances requiring emergency operation to serve the public interest. Such situations include: emergencies involving danger to life and property; a national emergency proclaimed by the President or the Congress of the U.S.A. and; the continuance of any war in which the United States is engaged, and where such action is necessary for the national defense or security or otherwise in furtherance of the war effort.

(1) An informal application may be used. The FCC may grant such construction permits, station licenses, modifications or renewals thereof, without the filing of a formal application.<sup>12</sup>

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<sup>6</sup> The Response by legal counsel indicates it is responding to NALs issued to both Mr. Britcher and Mr. Duncan. No hard copy of the Response has been received.

<sup>7</sup> 47 U.S.C. § 503(b).

<sup>8</sup> 47 C.F.R. § 1.80.

<sup>9</sup> 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*").

<sup>10</sup> 47 U.S.C. § 503(b)(2)(D).

<sup>11</sup> 47 U.S.C. § 301.

<sup>12</sup> 47 C.F.R. § 73.3542(a).

We disagree. The rule states that the Commission may grant authority upon informal application. At no time has Mr. Duncan provided evidence of any authority so granted by the Commission. In his response dated May 10, 2006, to the Notice of Unlicensed Radio Operation, Mr. Duncan stated that he has “made the informal application in the past, if not received, please consider the attached sheet their informal application to operate a radio station under 47 CFR 73.3542.” Mr. Duncan’s response included an undated and unsigned document titled “Informal Application for Emergency Authorization to Operate a Radio Station.” Mr. Duncan communicated this application and response to the Kansas City Office via electronic mail on May 11, 2006. On May 18, 2006, the District Director, Kansas City Office, acknowledged receipt of the email by return email to Mr. Duncan’s counsel of record, stating: “This will acknowledge receipt of your email response and the hard copy via USPS. The Enforcement Bureau does not handle license authorizations. Please refer to information on the Media Bureau’s web site at [www.fcc.gov](http://www.fcc.gov) & <http://www.fcc.gov/mb/audio/howtoapply.html>.” The Kansas City Office agent researched the Commission’s broadcast station databases and found no license, authorization, or application attributed to Mr. Duncan or that authorized the operation of the station operated by Mr. Duncan in Bettendorf, Iowa. Likewise, Mr. Duncan’s Response to the *NAL* provides no evidence of any proper application or authorization. Therefore, we find that Mr. Duncan had no authority to operate his radio station under Section 73.3542 of the Rules because there was no evidence he had ever made proper application to the Commission under that rule, and, even if he had, no authorization has ever been granted to him to operate that station. Mr. Duncan further argues that any forfeiture action by the Commission is barred “until the process 47 CFR 73.3542” is complete.” As we have already noted, there is no evidence that any such application process was initiated by Mr. Duncan until after the unlicensed station was found operating by the Commission agent. Even if he had applied, the act of applying for a Commission broadcast license confers no authority to operate on the applicant and does not bar the Commission from enforcement action if an applicant chooses to operate without authority. Such an interpretation of our rules would make meaningless the licensing requirement of Section 301 of the Act since all one would need to obtain authorization would be to apply without any review or approval by the Commission.

13. Mr. Duncan next argues that any action by the Enforcement Bureau is “preemptive and unauthorized” and “therefore unconstitutional.” Mr. Duncan provides no bases for this argument. The Commission, and by delegated authority its Enforcement Bureau, are authorized to commence monetary forfeiture actions such as the instant matter against Mr. Duncan.<sup>13</sup>

14. Finally, Mr. Duncan states that he has argued in previous responses that his constitutional rights are being infringed. The Response to the *NAL* provides no further discussion of this claim. In Mr. Duncan’s response to the Notice of Unlicensed Radio Operation, he claimed “1<sup>st</sup> amendment rights to operate a radio station” and “that the denial of more broadcasting stations in the Illinois/Iowa Quad Cities area is an infringement of their 1<sup>st</sup> Amendment rights.” We disagree. The U.S. Supreme Court has repeatedly held that there is no constitutional right to use radio facilities without a license.<sup>14</sup> In addition, the Commission’s licensing processes are irrelevant to whether Mr. Duncan operated radio transmitting equipment without the required authorization.

15. We have examined Mr. Duncan’s response to the *NAL* pursuant to the statutory factors above, and in conjunction with the *Forfeiture Policy Statement*. We conclude that Mr. Duncan willfully and repeatedly violated Section 301 of the Act on April 18 and April 19, 2006, by operating radio transmitting equipment at 2550 Middle Road, Bettendorf, Iowa, on 103.3 MHz without the required

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<sup>13</sup> See 47 U.S.C. § 503(b); 47 C.F.R. §§ 0.111, 0.311, 1.80.

<sup>14</sup> See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388 (1969); *National Broadcasting Co. v. United States*, 319 U.S. 190, 227 (1943); and *United States v. Dunifer*, 997 F.Supp. 1235 (N.D. Calif. 1998), *aff’d* on other grounds, 219 F.3d 1004 (9<sup>th</sup> Cir. 2000).

Commission authorization. We find no basis for cancellation or reduction of the proposed \$10,000 forfeiture.

#### IV. ORDERING CLAUSES

16. **ACCORDINGLY, IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.311 and 1.80(f)(4) of the Commission's Rules,<sup>15</sup> Jason L. Duncan **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of \$10,000 for willful and repeated violation of Section 301 of the Act.<sup>16</sup>

17. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within 30 days of the release of this *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.<sup>17</sup> Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251-8340. Payment by overnight mail may be sent to Mellon Bank /LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, PA 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106. Requests for full payment under an installment plan should be sent to: Associate Managing Director, Financial Operations, 445 12th Street, S.W., Room 1A625, Washington, D.C. 20554.<sup>18</sup>

18. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class Mail and Certified Mail Return Receipt Requested to Jason L. Duncan, Bettendorf, Iowa; and an additional copy to Mr. Duncan's counsel of record, Arshia Javaherian, The Law Center, Rock Island, Illinois.

#### FEDERAL COMMUNICATIONS COMMISSION

Dennis P. Carlton  
Regional Director, South Central Region  
Enforcement Bureau

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<sup>15</sup> 47 U.S.C. § 503(b); 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

<sup>16</sup> 47 U.S.C. § 301.

<sup>17</sup> 47 U.S.C. § 504(a).

<sup>18</sup> See 47 C.F.R. § 1.1914.